United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1268

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P/S

To be argued by
EUGENE F. BANNIGAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1268

UNITED STATES OF AMERICA,
Appellee,

—v.—

JACK L. CHESTNUT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1268

UNITED STATES OF AMERICA,

Appellee,

—v.—

JACK L. CHESTNUT,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Jack L. Chestnut appeals from a judgment of conviction entered on June 26, 1975 in the United States District Court for the Southern District of New York, after a four day trial before the Honorable Edward Weinfeld, United States District Judge, and a jury.

Indictment 74 Cr. 1191, filed December 24, 1974, charged Chestnut in one count with wilfully accepting and receiving and causing another to accept and receive an illegal corporate contribution on behalf of Senator Hubert H. Humphrey's 1970 Senatorial campaign for the office of United States Senator from the State of Minnesota, in violation of Title 18, United States Code, Sections 610 and 2.

The trial commenced on May 5, 1975, and ended four days later when the jury returned a guilty verdict.

On June 26, 1975, Chestnut was sentenced to four months in prison and fined $5,000.

Chestnut is at liberty pending appeal.

Statement of Facts

The Government's Case

Lennen & Newell, Inc.

In mid-February, 1970, Barry Nova, an account executive employed by Lennen & Newell, Inc. ("L&N"), a now defunct Manhattan-based advertising agency, received a telephone call from Bill Connell, a former administrative assistant to Senator Hubert H. Humphrey. Connell asked Nova to come to Minnesota to discuss L & N's handling of the advertising program for Humphrey's 1970 campaign for the office of United States Senator from the State of Minnesota. Nova agreed, and a few days later, at a meeting in the Lemington Hotel in Minneapolis, Nova was introduced by Connell to Humphrey's campaign manager, Jack L. Chestnut, and to Norman Sherman and discussed with them the services which L & N could render to the 1970 Humphrey Senatorial campaign. After this meeting in Minneapolis, Nova returned to New York and sent Chestnut a written proposal detailing L&N's advertising approach and the fees to be charged if its services were engaged by the Humphrey campaign. The fee schedule provided that L & N would be paid $6,000 per month during the early months of the campaign and $14,000 per month during the latter stages of the campaign. In late March, 1970, Chestnut

engaged L & N's services on the terms earlier proposed by Nova (Tr. 63-70; App. 181-188).*

In April, 1970, approximately one month after Chestnut had instructed Nova to launch the campaign's advertising program, Chestnut directed Nova ** to send the next two monthly invoices to Associated Milk Producers, Inc.*** ("AMPI"). Chestnut explained to Nova that billing AMPI would be helpful since it was early in the campaign and funding was scarce. Thus, at Chestnut's request Nova directed L&N's billing department to send its next invoice to AMPI at an address furnished by Chestnut. At about this same time Harold Nelson, AMPI's General Manager, told his assistant, Bob A. Lilly, that a bill from L & N covering services rendered to the Humphrey campaign would be arriving from Chestnut and that it was to be paid with AMPI funds.**** Nelson

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* References prefixed "App." refer to Appellant's Appendix; references prefixed "Tr." refer to the trial transcript, and references prefixed "GX" and "DX", respectively, refer to Government and Defense Exhibits received in evidence.

** Nova was unable to recall whether he received these instructions by telephone at his office in New York or directly from Chestnut at a meeting in Minneapolis, Minnesota (Tr. 72, 84; App. 190, 202).

*** AMPI was a corporation organized under the laws of the State of Kansas (GX 29).

**** During the period relevant to the indictment AMPI made political contributions from both its general corporate funds and from its political trust fund—Trust For Agricultural Political Education ("TAPE")—the corpus of which consisted solely of voluntary donations from AMPI members. Lilly testified that, in all instances but one, TAPE contributions were made by check and that the checks, on their face, identified TAPE as the source of the funds. Moreover, Lilly explained that a record of all TAPE contributions was filed with the Clerk of the United States House of Representatives. The TAPE records (GX 5) for the period March, 1969 through December 31, 1970 show that no TAPE contributions were made to the 1970 Humphrey Senatorial Campaign (Tr. 100-110; App. 219-229).

further instructed Lilly to contact Chestnut and make arrangements with him for the payment. Prior to contacting Chestnut, however, Lilly received a $12,000 L & N invoice designated "Consulting Fee For Minnesota." The invoice (GX 1), addressed to "Associated Milk Producers, Inc. c/o Bob Lilly, New Ulm, Minnesota," had apparently been forwarded from New Ulm to AMPI's headquarters in San Antonio, Texas, where Lilly maintained his office (Tr. 70-80, 112-117; App. 188-198, 231-236).

Shortly after Lilly's receipt of the $12,000 invoice, Chestnut telephoned Lilly and directed him not to pay the invoice because it was not in proper form.* Chestnut told Lilly that he would have the invoice corrected and would forward the corrected version to him for payment by AMPI. On May 7, 1970 Chestnut wrote to Lilly confirming these earlier instructions concerning AMPI's payment of the $12,000 L & N invoice (Tr. 118-120; App. 237-239; GX 6). In pertinent part, Chestnut's letter stated:

> "Thank you for your recent correspondence and enclosure. It is appreciated very much. The bill which I was going to forward to you did not arrive in proper form and I returned it for proper editing and will forward it as soon as it is received." (GX 6).

Five days later, on May 12, 1975, Chestnut sent Lilly four L & N invoices (GX 2), each in the amount of $3,000.** In a letter of transmittal Chestnut wrote:

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* Chestnut did not explain in what manner the invoice was incorrect (Tr. 118; App. 237).

** Like the first L & N invoice received by Lilly, the four additional invoices sent to him by Chestnut were addressed to: "Associated Milk Producers, Inc. c/o Bob Lilly, New Ulm, Minnesota," and described the services rendered as: "Consulting Fee For Minnesota" (GX 2).

> "Enclosed is the correct billing for Lennen & Newell, Inc. Please return the check to us and we will forward it to Lennen & Newell." (GX 7).

In the left hand margin of the letter the words "Payable to" followed by an arrow pointing to the typed words "Lennen & Newell" were written in script (Tr. 120-125; App. 239-244; GX 2 and 7).

On June 1, 1970, Lilly mailed a $6,000 AMPI check * (GX 3) payable to L & N to Chestnut at the latter's law firm in Minneapolis. In a cover letter accompanying the check Lilly wrote:

> "Enclosed is a check in the amount of $6,000 to cover advisory fee for Lennen & Newell, Inc. of New York. This covers two of the statements due them. In the near future an additional payment will be made" (GX 8).

A second identical $6,000 AMPI check (GX 4) payable to L & N was sent to Chestnut in Minneapolis on June 11, 1970 (Tr. 125-130; App. 244-248; GX 3, 4, and 8). On this occasion Lilly's letter of transmittal stated:

> "Enclosed is a check in the amount of $6,000 to pay the balance on two Lennen & Newell, Inc. invoices dated May 1, 1970 and May 8, 1970." (GX 9).

The June 1 and 11, 1970 AMPI checks were deposited in L & N's bank account at the Bankers Trust Company at 48th Street and Madison Avenue in Manhattan on June 9 and 22, 1970, respectively (Tr. 79, 307-313; App. 197, 422-428; GX 3 and 4).

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* In two places on the face of the check the title "Associated Milk Producers, Inc." appears in bold face type (GX 3).

Other Contributions

Apart from the payment of the campaign's $12,000 debt to L & N, AMPI made three additional contributions totalling $23,950 to Humphrey's 1970 Senatorial Campaign.

The first contribution in the amount of $10,000 was made on May 4, 1970. Lilly testified that in early May, 1970, Nelson instructed him to make $10,000 in AMPI corporate funds available to the Humphrey campaign by borrowing the money * from the Citizens National Bank in Austin, Texas and then forwarding it to Chestnut.

Pursuant to Nelson's instructions, Lilly obtained the loan (GX 13) and arranged for the proceeds to be transferred to a personal checking account which he maintained for the purpose of disguising similar illegal campaign contributions. Lilly then told Chestnut that AMPI had $10,000 to contribute to Humphrey's campaign and asked Chestnut how the contribution should be made. Chestnut instructed Lilly to send a check made payable to the Minnesota Democratic Campaign Committee

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* Lilly explained that it was a common AMPI practice to borrow funds for the purpose of making political contributions. Such loans were subsequently repaid with corporate funds obtained from some of AMPI's attorneys who, by employing fictitious billing procedures, acted as conduits for the repayment. For example, in the case of a $10,000 loan an attorney participating in the scheme would submit a fictitious $20,000 bill to AMPI. Upon payment by AMPI, the attorney would retain $10,000 to cover his taxes, and return the second $10,000 to AMPI who would make it available to Lilly to repay the loan (Tr. 145-146; App. 263-264). Lilly testified that Chestnut was not an AMPI attorney and was not involved in this scheme (Tr. 148; App. 266).

("MDCC"). On May 4, 1970 Lilly sent his personal check * to Chestnut, who acknowledged its receipt in a letter (GX 6) to Lilly, dated May 7, 1970 (Tr. 131, 142-145, 164-165; App. 249, 260-263, 281-282).

On June 11, 1970, the day on which Lilly sent Chestnut the second $6,000 AMPI check in payment of L&N's invoices, Chestnut telephoned Lilly and asked him for an additional contribution of $1,450. Chestnut explained that he needed the check for some particular campaign purpose and he asked Lilly to draw the check in favor of the MDCC. That same day Lilly sent a personal check (GX 11) in the amount requested to Chestnut. Chestnut's signature appears on the back of the check as the second endorsement. (Tr. 150-152, 289; App. 268-270, 403).

A final contribution, in the amount of $12,500, was made in October, 1970. This contribution, similar to the one made in May, 1970, was ordered by Nelson, who instructed Lilly to borrow the money and personally deliver the cash to Chestnut. Following these instructions, Lilly borrowed the money (GX 12) from the Citizens National Bank in Austin, Texas on October 12, 1970, and that same day delivered $12,500 in cash to Chestnut at the latter's law offices in Minneapolis, Minnesota (Tr. 154-159; App. 272-277).

Spoliation of Evidence and Chestnut's Signature

In 1973, subsequent to the formation of the Senate Select Committee On Presidential Campaign Activities (hereinafter the "Watergate Committee"), Penny Miller,

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* Lilly testified that he knew it was illegal for a corporation to make a political contribution. He also testified that he believed the $10,000 check sent in May, 1970 was illegal under another section of the Corrupt Practices Act which prohibits contributions in excess of $5,000 in any one calendar year to a political committee in connection with an election for a federal office (Tr. 149; App. 267).

Chestnut's personal secretary and law office manager, asked Chestnut if she could dispose of some of the campaign records including contribution records * from Humphrey's 1970 campaign which were being stored at the law firm. Chestnut responded that he would first have to call his legal advisor on campaign matters, John French, to determine whether he had any legal obligation to retain the records. Following this phone call, Chestnut told Miller to dispose of the records. In directing her to dispose of the records Chestnut added:

> "I don't think there is anything damaging in there, I haven't looked through them—I don't think they 'they' meaning the Watergate Committee—I don't think they could do me any harm with them, but, you know, let's get rid of them anyway, we don't need to keep them, I am not doing anything illegal by throwing them away, and then they won't have them anyway." (GX 16; Tr. 219-268; App. 336-382).**

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* The contribution records included 3 by 5 inch cards which listed the contributor's name, the amount of the contribution and identified whether the contribution was made in cash or by check (Tr. 223-224; App. 340-341). These records were burned in an incinerator (Tr. 233-234; App. 350-351).

** At trial Miller partially recanted her grand jury testimony (GX 16) and testified instead that while she had discussed disposing of the Humphrey campaign records with Chestnut, she was sure that that conversation occurred in 1972, prior to the formation of the Watergate Committee. She explained that when she had testified in the Grand Jury that she "knew, in fact" that the Watergate Committee was in session at the time of the conversation, she was in error. She admitted, however, that she did not bring this error to the attention of the Government's attorneys at a pre-trial conference held six days before the start of the trial. In fact, she testified that she did not even realize her error until the Saturday prior to the start of the trial (Tr. 219-268; App. 336-382).

On October 25, 1974, Special Agent Francis Henwood of the Federal Bureau of Investigation gave Chestnut's attorney, John A. Cochrane, copies of Chestnut's May 7 and 12, 1970 letters to Lilly. Both these letters (GX 6 and 7) were signed with the single name "Jack." On December 11, 1974, Chestnut provided the Federal Bureau of Investigation with exemplars of his full signature and of the name "Jack" (GX 18-A, 19 and 20). At trial, the Government's handwriting expert testified that the signature "Jack" on the letters to Lilly (GX 6 and 7) were written by the same person who had signed the name Jack L. Chestnut on a series of 1970 American Express charge receipts (GX 22 and 25) for an account belonging to Chestnut. The expert testified, however, that the signatures on the examplars provided to the Federal Bureau of Investigation when compared with those on the two letters and charge receipts looked as though they had been written by two different people (Tr. 269-303; App. 383-418).

The Defense Case

Chestnut testified on his own behalf. In addition, the defense called three substantive witnesses, John French, Jennifer Broome and Anthony Rico, and ten character witnesses.

Chestnut testified that he was formally named Humphrey's campaign manager in June, 1970, although he had acted in that capacity for several months prior to the designation. He received no salary as campaign manager and divided his time between his law firm's business and his campaign duties. Fred Gates served as the campaign's financial officer and treasurer and operated a number of fund raising committees, including the Minnesota Democratic Campaign Committee ("MDCC") (Tr. 389-390, 397-398; App. 503-504, 511-512; GX 11).

Chestnut recalled that in March 1970, L & N had been engaged as the Humphrey campaign's public relations and advertising consultant on a graduated fee basis of $6,000 per month during the early part of the campaign and at a higher sum during the latter months. During the course of the campaign, L&N's representatives stationed at the campaign's office located in Chestnut's law firm were Barry Nova and Jerry Gross (Tr. 395-397; App. 509-511).

In the Spring of 1970 Chestnut met Nelson and Lilly for the first item at Humprey's residence in St. Paul, Minnesota. Nelson and Lilly were visiting Humphrey to encourage him to enter the senatorial campaign. During this meeting, Chestnut learned that AMPI was willing to contribute between $40,000 and $50,000 to such an effort. Chestnut testified that he believed these contributions would be made by AMPI's political arm, that is, a special political campaign fund composed of voluntary contributions by individual members of AMPI. He also testified, however, that he was unaware of the identity of this fund until after 1970 (Tr. 395-396, 393, 410-411; App. 509-510, 507, 524-525).

Shortly after the meeting at Humphrey's house, Nelson contacted Chestnut and asked him whether the campaign had any unpaid printing or other bills. Chestnut replied that there were no printing bills, but that the campaign owed a sum of money to its New York advertising firm for services rendered. Nelson told Chestnut that AMPI would contribute $12,000 to be applied against this debt and instructed Chestnut to contact Lilly concerning the details of the payment. Chestnut testified that he had no recollection of ever having contacted either Lilly or Nova concerning the $12,000 payment of L & N's bill. He admitted, however, that the letters received by Lilly specifying the method of payment bore his signature, but that he did not recall either having dictated the letters or

signing them. The only positive testimony that Chestnut was able to give concerning the method of payment of L&N's invoices was that he was sure he had never seen the two $6,000 AMPI checks sent to him by Lilly. Moreover, he testified that he did not become aware of the fact that AMPI had used corporate funds to pay these invoices until some years later when he read about it in the newspapers (Tr. 402-406, 416-418; App. 516-620, 531-533).

Chestnut's testimony on direct examination concerning the three additional AMPI contributions was extremely brief. With respect to the $10,000 contributed on May 4, 1970, he testified that he was called by Nelson who told him that funds to meet AMPI's commitment to the campaign were available and that Chestnut should contact Lilly—the political fund's representative. When Chestnut later spoke with Lilly he told Lilly to make the check payable to MDCC. Shortly after this conversation Chestnut received, and later acknowledged receipt of, Lilly's personal check for $10,000 * (GX 10). Chestnut had no recollection concerning the second Lilly check in the amount of $1,450. He did admit, however, that his endorsement on the back of the check was authentic. Finally, Chestnut acknowledged that he received $12,500 in cash from Lilly in October, 1970. He testified that Lilly arrived at his law offices, handed him the money and told him that it represented the balance of AMPI's commitment (Tr. 398-400, 408-410; App. 512-514, 522-524).

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* Chestnut testified that on the basis of legal advice from the campaign's legal consultant, John French, he believed and continued to believe that individual contributions in excess of $5,000 in a single calendar year to a state or local committee in connection with a federal election were not illegal (Tr. 407-408; App. 521-522).

On cross-examination Chestnut was confronted with a series of checks (GX 31 id) totalling $5,000 payable to his order * and drawn on the personal account of Louis Connell, an AMPI consultant. Chestnut testified that the checks represented fees that his law firm had earned as attorney's for AMPI. He further explained that although he had no written retainer agreement with AMPI, he had been engaged by them in early 1970 on Connell's recommendation. He admitted, however, that billing Connell for legal services rendered on behalf of AMPI was not the usual billing procedure employed by his firm. Finally, he testified that it was a mere coincidence that the first Connell check, in part payment of the retainer, was dated shortly after the campaign began and the final check was dated one week after it concluded (Tr. 421-426; App. 536-541).

Notwithstanding the attorney-client relationship that Chestnut claimed existed between himself and AMPI, Chestnut maintained that he did not become aware of the identity of AMPI's political fund until long after the conclusion of the campaign. He explained that he had been retained to perform specific legal services for AMPI in connection with their activities in Minnesota, and thus was only familiar with AMPI's organization in that state. In the next breath, however, he testified that he was not even aware that AMPI had an office in New Ulm, Minnesota—the very office to which Nova, at Chestnut's direction, had sent the first $12,000 L&N invoice (Tr. 426-427, 71-75, 112-124; App. 541-542, 189-193, 231-243).

With respect to the $10,000 May 4, 1970 and $1,450 June 11, 1970 contributions drawn on Lilly's personal checking account, Chestnut testified that he believed these

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* The checks were deposited to Chestnut's law firm's account (Tr. 438; App. 553).

funds came from AMPI's special political fund. Chestnut admitted, however, he was aware that segregated funds such as these were generally kept in trust accounts and that drafts drawn on such accounts generally, on their face, identified the fund and indicated the capacity in which the drawee acted. Chestnut conceded that Lilly's personal checks did not indicate that Lilly acted in a representative capacity or that they were drawn on a special account (Tr. 412-415; App. 527-530).

Chestnut testified that campaign records stored at his law firm were disposed of on a number of occasions to provide additional space to meet the firm's business needs. He recalled that on one occasion Mrs. Miller, the law office manager, asked his permission to dispose of some of these materials and that he called John French to ascertain whether he had a legal obligation to retain them. He testified that after speaking with French, he helped Miller go through the records, some of which, including financial records, were then burned. Chestnut was then confronted with his October 18, 1973, testimony before the Senate Select Committee * where he had testified that no one had helped him dispose of any campaign records, that he had spoken to no one but John French about destroying campaign records and that the only financial records he recalled having disposed of were "thank you" letters relating to contributions (Tr. 427-437; App. 543-552).

Jennifer Broome, a former secretary at Chestnut's law firm and Humphrey campaign worker, testified that her duties during 1970 included handling Chestnut's legal and campaign correspondence. She testified that she did not recall seeing the two AMPI checks for $6,000 each but that she was familiar with L & N and that if, in

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* Book 25, Senate Select Committee on Presidential Campaign Activities, pp. 11732-11739 (GX 31 id.).

the course of the performance of her duties, she had seen the two AMPI $6,000 checks payable to L & N, she would have given them directly to either Nova or Gross who at the time were working out of the law firm's offices. She also testified that in 1972, following Humphrey's defeat for the Democratic Presidential nomination, she returned to Minneapolis from Washington, D.C., where she had run Humphrey's local campaign office, and assisted members of the law firm staff dispose of campaign materials from the 1972 campaign and previous campaigns (Tr. 354-380; App. 468-494).

John French testified that he had acted as Chestnut's legal advisor on matters relating to Humphrey's 1970 and 1972 campaigns. He testified that in 1970 he orally advised Chestnut that individual contributions in excess of $5,000 per year to a single intrastate political committee in connection with a federal election were not illegal under Title 18, United States Code Section 608 (1970). In 1972 French reaffirmed his opinion in an advisory letter to Chestnut (DX E). French also testified that in July, 1972, in response to a call from Chestnut, he advised Chestnut that he had no legal obligation to retain records from Humphrey's campaigns (Tr. 335-345; App. 449-459).

On cross-examination French testified that it was illegal for corporations to make political contributions and that anyone who made or received a contribution in the form of the two $6,000 AMPI checks would be in violation of federal law. Similarly, he admitted that any corporate contribution disguised as a personal contribution would also be illegal (Tr. 345-349; App. 459-463).

The ten character witnesses called by the defense uniformly testified that Chestnut had an excellent

reputation for truth, veracity and honesty.* (Tr. 350-354, 440-469; App. 464-468, 555-584).

ARGUMENT

POINT I

The evidence was more than sufficient to establish that Chestnut wilfully violated 18 U.S.C. §§610 and 2.

Chestnut contends that the evidence was insufficient to establish that he wilfully violated 18 U.S.C. §§ 610 and 2. Chestnut initially advanced this claim in a post-trial motion for a judgment of acquittal. Judge Weinfeld, in accordance with the applicable rules in this Circuit, properly reviewed the evidence and "readily" found that:

> "a reasonable mind might fairly conclude that the defendant wilfully violated Section 610 beyond a reasonable doubt—that the defendant knew he was causing another to accept or receive an illegal corporate contribution." (App. 787-794).

For the reasons given decisive weight in Judge Weinfeld's decision and others set forth below, it borders on the frivolous for Chestnut to suggest that the extensive evidence of deliberate and deceptive conduct on his part was insufficient to support the jury's conclusion that he acted wilfully in attempting to circumvent Section 610's

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* Chestnut's final substantive witness, Anthony Rico, testified that in 1972, in connection with Senator Walter Mondale's campaign for the United States Senate, he saw Chestnut return a corporate check which had been given to support Mondale's candidacy (Tr. 470-472; App. 585-587).

clear proscription against causing the receipt of a corporate contribution to a political campaign. *Spies* v. *United States*, 317 U.S. 492, 499 (1943); see also *United States* v. *Lemlich*, 418 F.2d 212 (5th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *United States* v. *Johnson*, 386 F.2d 630 (3d Cir. 1967).

The core of Chestnut's defense at trial was his testimony that he did not know that the two AMPI checks had been written on a corporate account but instead believed that AMPI had paid Lennen & Newell's $12,000 invoice from an AMPI-related political fund consisting entirely of voluntary donations from its membership.* The jury, however, was clearly justified in rejecting Chestnut's testimony since the Government's evidence established, *inter alia*, that Chestnut personally arranged for the preparation of invoices issued to AMPI for services rendered by Lennen & Newell to the Humphrey campaign and not to AMPI; that payment of those invoices was made illegally with AMPI corporate funds; that as a consequence of these arrangements, there existed no documentation that AMPI had contributed $12,000 to the Humphrey campaign; that the two AMPI checks (GX 3, 4) with which the Lennen & Newell invoices were paid unmistakably indicated on their face that they had been written on AMPI's general corporate account; and finally, that these two corporate checks were sent directly to Chestnut on two separate occasions prior to their being turned over to L & N and deposited in L & N's bank account in Manhattan. *United States* v. *De Garces*, Dkt. No. 75-1013 (2d Cir., September 13, 1975); *United States* v. *La Froscia*, 485 F.2d 457 (2d Cir. 1973).

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* It is clear that certain political funds, composed solely of voluntary donations from their members, may contribute to political campaigns without running afoul of Section 610. See *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409 (1972).

Notwithstanding this compelling evidence against him, Chestnut nevertheless contends, as he did unsuccessfully before the jury, that given the absence of any proof that he had a motive to accept corporate funds on behalf of the campaign and the failure of the Government to offer direct evidence that he ever saw the AMPI corporate checks, a reasonable mind could not fairly conclude guilt beyond a reasonable doubt. These contentions are both factually and legally without merit.

Proof of motive was not essential to the Government's case.* *Pointer* v. *United States*, 151 U.S. 396 (1894). The Government's burden was not to show that Chestnut was a wicked man whose heart was set on attaining high political office, but rather that in arranging AMPI's payment of the campaign's debt to L&N he acted with knowledge that he was violating the law and without regard to its consequences. *United States* v. *Simon*, 425 F.2d 796, 808-809 (2d Cir. 1969), *cert. denied*, 387 U.S. 1006 (1970). The Government clearly met this burden. The jury was readily able to infer Chestnut's knowledge and intent from the evidence which, when viewed in a light most favorable to the Government, *Glasser* v. *United*

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* Although not essential to the Government's case, the evidence quite clearly established both Chestnut's motive to accept illegal corporate funds and AMPI's motive to make such contributions. Chestnut's motive was quite simply a shortage of funds to run the campaign which he managed. This is evidenced by both his statement to Nova that billing AMPI for the campaign's debt to L&N would be helpful because it was early in the campaign and funds were difficult to get and his subsequent urgent request to Lilly for $1,450 to pay a specific campaign debt (Tr. 71-72, 76, 149-151; App. 189-190, 194, 267-269). AMPI's motive, on the other hand, was a desire to ingratiate itself to Humphrey while at the same time remaining in the good graces of the Nixon Administration. Since TAPE publicly reported its political contributions (GX 5) AMPI was forced to use corporate funds to accomplish its dual political objectives (Tr. 105-110, 177-179; App. 224-229, 294-297).

States, 315 U.S. 60, 80 (1942); *United States* v. *Freeman*, 498 F.2d 569 (2d Cir. 1974); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2d Cir.), *cert. denied*, 404 U.S. 850 (1970); *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963), established that AMPI contributed $12,000 of its general corporate funds to the Humphrey campaign pursuant to an extraordinary plan, devised solely by Chestnut, the obvious objective of which was a clandestine circumvention of the clear proscription against corporate contributions. The jury's conclusion that Chestnut's conduct was willful, i.e. that he acted with the requisite knowledge and intent, was not only warranted but virtually inescapable given the uncontradicted proof before it that: it was Chestnut who, explaining that the campaign was hard-pressed for funds, directed L&N to bill AMPI for services rendered to the Humphrey campaign; it was Chestnut who directed Lilly not to pay the first invoice because of its improper form and explained to Lilly that he would forward the corrected invoices to AMPI; it was Chestnut who forwarded four $3,000 L&N invoices to Lilly, which on their face purported to be for services rendered to AMPI in Minnesota; it was Chestnut who, in a letter to Lilly, directed that the checks in payment of the invoices be made payable to L&N; and finally it was to Chestnut's law firm that the two checks bearing AMPI's corporate legend came to rest before being turned over to L&N, who later deposited them in its bank account in Manhattan. Indeed, as Judge Weinfeld so aptly stated in denying Chestnut's motion for a judgment of acquittal on this same ground:

> "defendant's acts and conduct relating to the contribution come within the classic statement by the Supreme Court of circumstances under which willfulness may be inferred, including the 'handling of one's affairs to avoid making records usual in the transaction of the kind, and any conduct, the likely

> effect of which would be to mislead or to conceal.' *Spies* v. *United States*, 317 U.S. 492, 499 (1943)." (App. 792-793).

Chestnut's claim that the jury could not have found wilfulness on his part in the absence of direct proof that he saw the corporate checks is frivolous. Judge Weinfeld in his charge on wilfullness specifically focused the jury's attention on this issue suggesting that they focus on this question, among others: "Did the defendant ever see the AMPI checks of $6,000 each?" (Tr. 561). The jury, we submit and Judge Weinfeld found, answered with its verdict—a determination amply supported by extensive circumstantial proof.

However, whether Chestnut actually saw the two $6,000 checks, which clearly disclosed that they were written on an AMPI corporate account and which were mailed to Chestnut at his law firm, is hardly dispositive of his guilt. As Judge Weinfeld accurately observed at sentence (App. 813):

> "Despite the defendant's persistence that he did not willfully violate the law, and his claim that he believed that the funds came from AMPI's political arm, which could make a legal contribution, there has been no adequate explanation of why, if that was so, the devious and circuitous method was employed whereby AMPI made the payment to Lennen & Newell instead of making it directly to the Humphrey campaign committee, so that the committee would pay Lennen & Newell in the ordinary course of events."

This question has not been answered yet, and it is a particularly poignant one, given the fact that Chestnut received other substantial illegal contributions directly from AMPI both before and after the Lennen and Newell

invoices were paid with AMPI checks. While Chestnut claimed in his testimony that, as with the moneys used to pay Lennen & Newell, he believed that these other illegal AMPI contributions were from its lawful political trust fund TAPE—an absurd assertion with regard to his receipt of $12,500 in cash from Lilly in October, 1970, which entitled the jury to reject his testimony of his belief in the legality of all AMPI contributions, including the funds used to pay Lennen & Newell, the evidence that Chestnut directly accepted the other contemporaneous AMPI contributions suggests that there was no reason why the $12,000 used to pay Lennen & Newell should have treated as it was except to conceal its illicit origins. Chestnut's receipt of AMPI "legal fees" by means of personal checks from an AMPI consultant buttresses the same conclusion.

In sum, the uncontroverted evidence was ample to show that Chestnut devised an extraordinary plan calling for L&N to bill AMPI—to whom it was not indebted in any way—for services which L&N had rendered to the Humphrey campaign and for which the campaign had promised to pay L&N $12,000. Such proof further established that as a result of Chestnut's continuous orchestration of the joint efforts of AMPI and L&N, $12,000 of AMPI's corporate funds were deposited in L&N's bank account in New York. While Chestnut claimed that he did not know that the AMPI checks had been written on a corporate account, a reasonable juror, who had seen and heard the witnesses and had examined the documentary proof, plainly had a more than sufficient basis to be convinced of the contrary beyond a reasonable doubt. *Cf. United States* v. *Rivera*, 513 F.2d 519, 530 (2d Cir. 1975); *United States* v. *Calabro*, 449 F.2d 885, 890 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

POINT II

Venue was proper in the Southern District of New York.

Chestnut renews his contention, first raised squarely following the return of the adverse verdict, that the evidence failed to prove venue in the Southern District of New York. In addition, he contends for the first time on this appeal that venue in this district was improper because the offense was completed in Minnesota when the agreement by AMPI to pay the Humphrey campaign's debt to L&N was concluded. Chestnut's contentions are without merit. Moreover, it is clear from the record that Chestnut waived any claim that venue did not lie in the Southern District of New York.

It is hornbook law that the Constitution does not confer upon a defendant an absolute right to be tried in the district of his residence. *See, e.g. Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245 (1964); *Johnston* v. *United States*, 351 U.S. 215, 220-21 (1956); *United States* v. *Bithoney*, 472 F.2d 16 (2d Cir.), *cert. denied*, 412 U.S. 938 (1973). Nor is it necessary that a defendant have entered the district in which his offense was committed in order for venue to be properly laid there. *See, e.g. Palliser* v. *United States*, 136 U.S. 257 (1890); *Burton* v. *United States*, 202 U.S. 344 (1906); *Travis* v. *United States*, 364 U.S. 631 (1961). Rather, the focus in venue cases is solely upon the *locus* of the crime, *United States* v. *Cores*, 356 U.S. 405, 407 (1958); *United States* v. *Anderson*, 328 U.S. 699 (1946), for under both the Sixth Amendment and Article III, Section 2 of the Constitution a defendant must be tried in the district where the crime charged was committed. *United States* v. *Bithony, supra*, 472 F.2d at 22-23. Thus, as Judge Weinfeld correctly observed in denying Chest-

nut's motion: "In determining proper venue, the court must determine the place of the crime after an analysis of the nature of the alleged offense." (App. 787-803).

Chestnut was found guilty of violating Title 18, United States Code, Section 610 (1970) which, among other things, made it a federal offense for any "person to accept or receive" a corporate political campaign contribution in connection with a primary or general election for the United States Senate. Since the Government's theory of liability was that, as the indictment specifically charged, Chestnut caused Lennen & Newell, Inc. to accept or receive the illegal contribution, the trial court instructed the jury that under Section 2(b) of Title 18, United States Code: "Whoever wilfully causes an act to be done which if directly performed by him would be an offense against the United States, is punishable as a principal." * Section 2, of course, does not define a substantive offense; rather it merely makes punishable under Section 2(b) one who causes the commission of a substantive offense, or, under Section 2(a), one who is an accessory to an offense. *United States* v. *Campbell*, 426 F.2d 547, 553 (2d Cir. 1970); *United States* v. *Gerhart*, 275 F. Supp. 443 (D.C. W.Va. 1967). Thus, for the purpose of ascertaining the *locus* of the offense, the key

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* As Judge Weinfeld noted in his charge (Tr. 550; App. 666) it is, of course, unnecessary that Lennen & Newell have the knowledge or criminal intent required for conviction so long as the evidence established, as it did here, that Chestnut had both and that he caused the receipt of the AMPI contributions by Lennen & Newell. *United States* v. *Scandifia*, 390 F.2d 244, 249 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969); *United States* v. *Bryan*, 483 F.2d 88, 92 (3d Cir. 1973) (*en banc*); *United States* v. *Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967); *United States* v. *Barr*, 295 F.2d 889 (S.D.N.Y. 1971) (Weinfeld, J.); see also *United States* v. *Weisscredit Banca Commerciale E D'Investimenti*, 325 F. Supp. 1384, 1396 (S.D.N.Y. 1971).

words of the statutory prohibition are "to accept or receive" an illegal contribution and not, as Chestnut suggests (Brief, at 28), his *causing* * the acceptance and receipt by Lennen & Newell.

The decisions under Section 610, none of which deal with venue, are of no aid in fixing the situs of this essential element. However, where, as here, the gist of the offense is the unlawful receipt of anything of value and the recipient is given a check, the Supreme Court has held that venue lies in the district where the check is deposited and credited to the recipient's account. *Burton* v. *United States*, 196 U.S. 283 (1905). And this is so notwithstanding that the recipient in the first instance physically received the check in another district. *United States* v. *Lotsch*, 102 F.2d 35, 36 (2d Cir.), *cert. denied*, 307 U.S. 622 (1939). In *Burton*, the defendant, a United States Senator, was convicted in the Eastern District of Missouri for violating a statute which made it a criminal offense for a Senator to receive compensation for services rendered in connection with matters in which the United States was an interested party. The Court reversed Burton's conviction, holding that venue was improper since Burton did not *receive* the proscribed compensation until the check was deposited in and credited to his account in Washington, D.C. Similarly, in *United States* v. *Johnson*, 337 F.2d 180, 193-95 (4th Cir. 1964), *aff'd.*, 383 U.S. 169 (1966), a prosecution brought in the district of

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* Chestnut's reliance on *United States* v. *Brothman*, 191 F.2d 70 (2d Cir. 1951) for the proposition that venue was proper only in Minnesota where he performed the acts which caused L&N to accept and receive the contribution in the Southern District of New York is misplaced. However, *Brothman* merely reaffirms the principal that venue is proper only in the district where the substantive offense, i.e. procuring a witness to give false testimony, occurred. See generally *United States* v. *Slutsky*, 487 F.2d 832, 838-839 (2d Cir.), *cert. denied*, 416 U.S. 937 (1973); *United States* v. *Natelli*, Dkt. No. 75-100[illegible] (2d Cir., July 28, 1975) slip op. 5192-5194.

had been entirely consistent with the pre-trial disclosure, Chestnut failed to allege the impropriety of venue in support of his motion for a judgment of acquittal. Rather, Chestnut's discussion centered around his request that the Court include in its charge to the jury an instruction that venue must be proven beyond a reasonable doubt.* This request was denied (Tr. 328-331; App. 443-446). See *United States* v. *Jenkins*, 510 F.2d 495, 497-498 (2d Cir. 1975); *United States* v. *Catalano*, 491 F.2d 268, 276 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Again, at the close of all the evidence, no motion on venue grounds was made. Following the verdict, however, Chestnut moved for a judgment of acquittal on the grounds that the evidence failed to prove venue in the Southern District of New York and that, in any event, venue in this district was improper because all of Chestnut's acts in *causing* Lennen & Newell to accept or receive the prohibited contribution occurred in Minnesota. This motion was denied (App. 794-801).

The first clearly identifiable instance in which Chestnut waived any claim that venue in this district was improper occurred one week prior to trial when he moved for a change of venue, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, to the District of Minnesota on the ground that New York was inconvenient to his more than 20 character witnesses. Article III, Section 2, Clause 3 of the United States Constitution, the Sixth Amendment of the Constitution, and Rule 18 of the Federal Rules of Criminal Procedure grant a defendant the right to be tried in the state and district where the alleged crime was committed. It is

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* It is conceivable that counsel's remarks intended to embrace a motion for a judgment of acquittal on venue grounds, but the record by no means establishes this.

clear, however, that this is a personal privilege which may be waived by the accused. See, e.g., *United States* v. *Brothman*, 191 F.2d 70 (2d Cir. 1951); *Hilderbrand* v. *United States*, 304 F.2d 716, 717 (10th Cir. 1962); *Lafoon* v. *United States*, 250 F.2d 958, 959 (5th Cir. 1958); *Ernst* v. *United States*, 198 F.2d 561, 562 (6th Cir. 1952); *United States* v. *Gallagher*, 183 F.2d 342, 345-347 (3d Cir. 1950). It is equally clear that the making of a motion for a change of venue pursuant to Rule 21(b), as Chestnut did, for the convenience of the defendant constitutes such a waiver. *United States* v. *Angiulo*, 497 F.2d 440, 441-442 (1st Cir.), *cert. denied*, 419 U.S. 896 (1974); *United States* v. *Jercha*, 458 F.2d 1340, 1341 (9th Cir. 1972); *Jones* v. *Gasch*, 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968); 8 Moore's Federal Practice, §§ 18.02[1] and 21.02 (2d ed. 1975).

Even if it could be successfully argued that the mere making of such a motion for a change of venue is not a waiver of a defendant's right to be tried in the district of the offense, Cf. *United States* v. *Marcello*, 280 F. Supp. 510 (E.D. La. 1968), *aff'd.*, 423 F.2d 903 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970), such an argument would be of no avail to Chestnut. Here, assuming that venue was improper in the Southern District of New York, Chestnut was in possession of all the facts relevant to venue at least one month prior to the trial when he received the Government's bill of particulars, and more likely three months before the trial when he received the Government's affidavit of February 4, 1975. Under these circumstances Chestnut's election to proceed to trial without first questioning the propriety of venue was a clear waiver of any claim that venue was not properly laid in this district. *United States* v. *Gross*, 276 F.2d 816, 819 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960); *United States* v. *Jones*, 162 F.2d 72, 73 (2d Cir. 1947); *United States* v. *Brothman*, *supra*; *United States* v. *Bohle*, 445

F.2d 54, 58-59 (7th Cir. 1971); *Hagner* v. *United States*, 54 F.2d 446 (D.C. Cir. 1931); 8 Moore's Federal Practice § 18.02 (2d ed. 1975).

If the alleged impropriety of venue was not apparent prior to the trial, it was certainly manifest at the close of the Government's case. Notwithstanding this, Chestnut nevertheless failed to ground his motion for a judgment of acquittal on this claim of error,* but rather waited until after the jury returned its adverse verdict to assert such a claim. It is settled law that a claim of improper venue will not be entertained if, as occurred in this case, a defendant fails to move for a judgment of acquittal, specifying improper venue or inadequate proof of venue, at the close of the Government's case. *United States* v. *Rivera, supra; United States* v. *Gross, supra; United States* v. *Brothman, supra.* See generally *United States* v. *Price*, 447 F.2d 23, 27 (2d Cir.), *cert. denied*, 404 U.S. 912 (1971). See also *United States* v. *Jackson*, 482 F.2d 1167, 1179 (10th Cir. 1973), *cert. denied*, 414 U.S. 1159 (1974); *United States* v. *Dryden*, 423 F.2d 1175, 1178 (5th Cir.), *cert. denied*, 398 U.S. 950 (1970); *Harper* v. *United States*, 383 F.2d 795 (5th Cir. 1967). *A fortiori*, a defendant who first challenges venue after the jury has returned its verdict has no standing to assert such a claim.

Given the foregoing, Chestnut is in no position to claim that venue was not proper in this district.

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* Chestnut's request at the close of the Government's case that the trial judge instruct the jury in the charge that venue must be proven beyond a reasonable doubt can not be construed as a motion for a judgment of acquittal on the ground that the Government failed to prove venue. See *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.), *cert. denied*, 342 U.S. 937 (1968); cf. *United States* v. *Michelson*, 165 F.2d 732, 734 (2d Cir.), *aff'd*, 335 U.S. 469 (1948); see also *Gilbert* v. *United States*, 359 F.2d 285, 288 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966).

POINT III

The 1970 versions of sections 610 and 591 fully satisfy due process and First Amendment standards of definiteness and thus are not unconstitutionally vague.

Chestnut contends that the 1970 version of Sections 610 and 591 was unconstitutionally vague and, therefore, void. More specifically, Chestnut claims that the 1970 statute drew an inadequate distinction between the terms "contribution" and "expenditure" which prevented him from recognizing the $12,000 AMPI payment to L&N as a proscribed contribution to the Humphrey campaign.

This claim, advanced in virtually identical form in Chestnut's pre-trial motion to dismiss the indictment, was carefully considered by Judge Weinfeld and flatly rejected. *United States* v. *Chestnut*, 394 F. Supp. 581, 586-591 (S.D. N.Y. 1975). Judge Weinfeld was clearly correct in holding that, in light of the statute's clear purpose, legislative history and the Supreme Court's analysis and interpretation thereof, its language enabled any well-intentioned person to readily conclude that AMPI's utilization of corporate funds to pay a $12,000 debt owed by the Humphrey Campaign to L&N was plainly proscribed as an illegal corporate contribution. Indeed, since the 1970 version of Section 610 banned the making of any contribuiton or expenditure by a corporation, assuming *arguendo* that the $12,000 AMPI payment was an expenditure—as Chestnut erroneously contends—he nonetheless violated 18 U.S.C. Sections 610 and 2 by having caused AMPI to make it. Thus, at the time Chestnut devised the extraordinary plan pursuant to which AMPI would discharge a $12,000 debt of the Humphrey campaign, the only conceivable matter about which Chestnut might reasonably have been confused was the number of different ways in

which his plainly unlawful conduct would violate the statute.*

Strong presumptive validity attaches to any statute duly enacted by the Congress. Accordingly, when assessing the validity of "void-for-vagueness" attacks on such statutes, courts are constrained to seek interpretations which support their constitutionality. *United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32-33 (1963); *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 92-93 (1921). No great effort need be exerted here, for the 1970 versions of Sections 610 and 591 easily meet applicable due process standards of definiteness since their provisions enable persons of ordinary intelligence to readily understand which payments made on behalf of political campaigns constitute illegal corporate contributions. *United States* v. *National Dairy Products Corp.*, *supra* at 32-33; *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *Jordan* v. *De George*, 341 U.S. 223, 230 (1951); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Sproles* v. *Binford*, 286 U.S. 374, 393 (1932). It follows that the 1970 versions of sections 610 and 591 were not unconstitutionally vague since they gave Chestnut fair notice that the $12,000 paid at his direction to L&N by AMPI with its corporate funds solely to discharge a debt incurred by the Humphrey campaign constituted an illegal campaign contribution.

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* Of course, the specious nature of Chestnut's claim now is most dramatically exposed by his own testimony at trial. Although he now claims prejudice because of an inability to distinguish between an expenditure as opposed to a contribution, his trial testimony was that at the time he arranged the AMPI payment he believed that the payment came from an AMPI-related political fund (App. 506-507, 520, 528-531, 534) which, of course, would have exempted the money from the operation of Section 610 entirely and rendered irrelevant distinctions between a "contribution" and an "expenditure".

The legislative history of Section 610 demonstrates the clear distinction between a "contribution" and an "expenditure" and thus exposes the specious nature of Chestnut's claim. Section 610 was amended in 1947 by the Taft-Hartley Act (61 Stat. 159) to strengthen the existing prohibition against corporate and union "contributions" by extending the statute's reach to prohibit "expenditures" and thereby further eliminate corruptive influences upon those seeking public office. While the statute clearly forbade union or corporate "gifts" to a candidate or to his campaign organization, there was apparently some doubt whether its prohibitions were even more extensive. See *United States* v. *Auto. Workers*, 352 U.S. 567, 579-580 (1957); *United States* v. *CIO*, 335 U.S. 106, 115 (1948). Congressional investigations into the 1944 and 1946 elections disclosed that the force of the existing statute had been circumvented when unions participated in federal elections by making independent "expenditures" as distinguished from "contributions" to candidates or their committees. S. Rep. No. 101, 79th Cong., 1st Sess. 23. Such investigations revealed that unions had spent large sums of money to influence the outcome of various elections by direct communication to the public through the distribution of pamphlets and campaign literature and the sponsoring of partisan radio broadcasts independent of the favored candidates campaign organization. *United States* v. *Auto. Workers, supra,* 352 U.S. at 580-589.

In *Auto. Workers*, the Supreme Court held that an offense was stated under an indictment which charged that a union had "used union dues to sponsor commercial television broadcasts designed to influence the electorate to select certain candidates for Congress in connection with the 1954 elections." *Id.* at 585. The Court's decision was clearly premised on its findings that the evil which Congress had sought to eliminate by the 1947 addition of

the ban on "expenditures" to the existing prohibition of "contributions" was "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party", *Id.* at 589, and that it was to embrace precisely the kind of indirect political support alleged in the indictment there challenged that Congress had amended Section 610 to proscribe "expenditures".

Thus, as used in the 1970 statute, "expenditure" refers to the use by a corporation or a union of its funds to promote *its own* political aims by endorsing or opposing candidates for federal office. Such "expenditures" are made to meet the corporation's or union's own obligations. By contrast, under the 1970 version of the statute, a "contribution" refers, *inter alia*, to a "gift . . . of money, or anything of value", 18 U.S.C. § 591, typically made to a candidate or his campaign organization to help the candidate carry *his* message to the public. *United States* v. *Chestnut, supra*, 394 F. Supp. at 586-687.*

Chestnut does not claim that AMPI itself was indebted to Lennen & Newell and must also concede that the Humphrey campaign, not AMPI, incurred the debt to Lennen & Newell, and that AMPI made the $12,000 payment to L&N solely in order to discharge the Humphrey campaign's obligation to L&N. Plainly Chestnut does not claim that the statute would not clearly proscribe receipt of an AMPI contribution by the Humphrey campaign. Chestnut's argument necessarily is that there is

* The foregoing analysis makes plain the utter want of merit in Chestnut's argument in Point IV of his brief that the AMPI moneys were an "expenditure" within the meaning of the 1970 version of Section 610, rather than a "contribution" as the indictment charged.

an ambiguity whether this fundamental statutory provision and purpose can be avoided by the simple and crude device of having the corporate contributor discharge a debt incurred by the campaign instead of making its contribution to the campaign directly. This ambiguity, we respectfully submit can only be perceived by one who blinds himself to what the statute plainly means. Under the plain language of the 1970 version of the statute, no well-intentioned person could escape the conclusion that the $12,000 AMPI payment was proscribed as an illegal "contribution". Accordingly, the 1970 statute satisfies due process standards of definiteness.

Chestnut's further contention that, on its face, the 1970 version of the statute unnecessarily restricts conduct protected by the First Amendment is also without merit.

Chestnut's assumption that he has standing to challenge the facial validity of the 1970 statute stems from his misplaced reliance on a line of cases in which the traditional rule of constitutional adjudication—that one to whom a statute may be constitutionally applied will not be heard to challenge the statute on the ground that it may be applied unconstitutionally to others—has not been invoked, thereby permitting a defendant to challenge a statute not because his own First Amendment rights are infringed but due to concern that the statute's continued existence may cause others not to engage in constitutionally protected expression. See *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Coates* v. *Cincinnati*, 402 U.S. 611 (1971); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).*

* Judge Weinfeld, assuming without deciding that Chestnut had satisfied the standing requirement to even raise such a claim, determined that the 1970 version of the statute constitutes the "least drastic means" of effectuating legitimate congressional interest in "preserving the integrity of the electoral process" and that its prohibitions, therefore, do not "unnecessarily impinge upon First Amendment rights". *United States* v. *Chestnut*, 394 F. Supp. 581, 590-591 (S.D.N.Y. 1975).

Although Chestnut does not acknowledge it, in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615-616 (1973) the Supreme Court restricted standing in the First Amendment area. Where, as here, conduct and not speech is involved, unless the statute is "substantially overbroad" a defendant may not challenge whatever overbreadth may exist if his "conduct falls squarely within the 'hard core' of the statute's proscriptions." Clearly, Chestnut's claim of overbreath cannot be "substantial . . . judged in relation to the statute's plainly legitimate sweep", *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 608-615. Accordingly, this Court should not entertain Chestnut's constitutional attack on the facial validity of Section 610 and 591, *Id.* at 615-616. See also *Parker* v. *Levy*, 417 U.S. 733, 759 (1974); *Perry* v. *St. Pierre*, 518 F.2d 184 (2d Cir. 1975).*

In any event, the Supreme Court has clearly determined that the right to participate in any aspect of political elections is not unlimited and that, accordingly, the management, financing and conduct of political campaigns are all properly subject to governmental regulation. See *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 567 (1973); *Rosario* v. *Rockefeller*, 410 U.S. 752, 760-

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* To establish his standing to challenge the facial validity of the 1970 statute, Chestnut relies essentially on *Coates* v. *Cincinnati*, 402 U.S. 611, 619-620 (1971) (Br. at 37-38). However, in his dissenting opinion in *Broadrick*, Mr. Justice Brennan asserts that by its decision, the *Broadrick* majority has "effectively overrule[d]" *Coates*, 413 U.S. at 622. A dissenter's view of the scope of a majority opinion is not, of course, dispositive, *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1975), and in *Broadrick* the majority opinion makes clear that in its view standing under *Coates* to attack overbreadth was limited to contexts in which the statutory defect was pervasive. *Id.* at 616 n. 14. Chestnut's arguments concerning Section 610, even if they were valid, hardly rise to such a level, and accordingly, whatever the scope of *Broadrick*, Chestnut cannot rely on *Coates*.

762 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U.S. 134, 140-141 (1972); *Jenness* v. *Fortson*, 403 U.S. 431 (1971); *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968); *Kusper* v. *Pontikes*, 414 U.S. 51, 56-61 (1973). Consistent with the thrust of such Supreme Court pronouncements, the 1970 version of Section 610 does not *per se* bar union officials, members, corporate officers and stockholders from participating in federal elections. On the contrary, under its terms each remains free to use his individual resources to the extent otherwise provided by law. The narrow focus of the statute's prohibitions is on moneys derived from corporate treasuries and general union funds; only contributions and expenditures from those two sources are proscribed. Such prohibitions serve the twin objectives sought to be achieved by the Congress, which since 1907 has continually struggled to enact legislation which would enhance the integrity of the electoral process.

The first such Congressional objective was "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital," *United States* v. *Auto. Workers*, 352 U.S. 567, 585 (1957); *Pipefitters Local No. 562* v. *United States*, 407 U.S. 385, 415-416 (1972); *United States* v. *C.I.O.*, 335 U.S. 106, 113 (1948). Second, Congress sought to prevent corporate and union officials from using corporate or general union funds for political purposes without the consent of stockholders or union members. Collateral to this objective was the protection of minority interests from overreaching by union leadership or corporate officials and, in the case of unions, to safeguard from loss of jobs or union membership or from reprisal by union officials those employees who might object to the use of union dues for political purposes. *Pipefitters Local Union No. 562* v. *United States*, *supra*, 407 U.S. at 413-414; *United States* v. *Auto. Workers*,

supra, 352 U.S. at 582; *United States* v. *C.I.O.*, *supra*, 355 U.S. at 113, 115; *Ash* v. *Cort*, 496 F.2d 416, 422 (3d Cir. 1974), *cert. granted*, 419 U.S. 992 (1975); *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973).

Thus, in assessing the constitutionality of the 1970 statute's prohibitions, this Court need only determine whether Congress chose the "least drastic means" of safeguarding such obviously legitimate public interests. *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). Section 610 and its definitional counterpart, Section 591, in their 1970 form, clearly meet this "least drastic means" test.

As authoritatively construed by the Supreme Court, the statute narrowly proscribes contributions and expenditures from only two sources—corporate treasuries and general union funds. Thus, as the Supreme Court's decision in *Pipefitters*, *supra*, 407 U.S. at 401, makes clear, the statute prohibits only union contributions from monies derived from compulsory union dues and assessments, thus leaving a union free to establish a political organization for the receipt of voluntary contributions for union members. Similarly, in *United States* v. *C.I.O.*, *supra*, 335 U.S. at 311, the Supreme Court held that the statute does not prevent unions or corporations from publishing a regular periodical for union members, shareholders or customers that may contain political commentary. In the foregoing decisions, the Supreme Court has clearly demonstrated that the statute, in its 1970 form, is readily capable of careful construction to minimize its restrictive impact. *Parker* v. *Levy*, *supra*, 417 U.S. at 754; *United States* v. *Chestnut*, *supra*, 394 F. Supp. at 591. It is not surprising, therefore, that while Chestnut complains of the statute's vagueness and overbreadth he has been un-

able to formulate a less restrictive alternative scheme of regulation equally capable of effectuating the important public objectives with which Congress was concerned.

Thus, "even if the outermost boundaries of [the statute in its 1970 form] may be imprecise, any such uncertainty has little relevance here, where [Chestnut's] conduct falls squarely within the 'hard core' of the statute's proscriptions." *Broadrick* v. *Oklahoma, supra,* 413 U.S. at 608. And since whatever overbreadth Chestnut claims to exist cannot possibly be "substantial" when examined in relation to [the statute's] legitimate purposes," *Broadrick* v. *Oklahoma, Id.* at 618, *Arbeitman* v. *District Court of Vermont,* Dkt. No. 74-2509 (2d Cir., September 16, 1975), slip. op. at 6163, it follows that Chestnut's attack on the facial validity of the statute must fail.

POINT IV

The indictment does not violate the *ex post facto* clause of the United States Constitution.

Chestnut contends that the specific conduct with which he is charged in the indictment—causing Lennen & Newell to receive in 1970 an illegal campaign contribution in the form of a $12,000 payment from AMPI—was not illegal under the 1970 version of Section 610 but only became criminal in 1972 when Section 610 was amended by Section 205 of the Federal Election Campaign Act. Accordingly, Chestnut claims that his conviction must be reversed because the indictment violates the *ex post facto* clause of the United States Constitution * which *per se*

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* Art. I, § 9, cl. 3.

bars prosecution for any act legal when done but later made illegal. The claim is without merit.*

The 1970 version of Section 610 provides, in pertinent part:

> "It is unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with any election at which . . . a Senator . . . [is] to be voted for, . . . or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this Section."

Thus, as Chestnut concedes, in 1970 it was plainly unlawful for (1) a corporation to make "a contribution or expenditure", and for (2) any person to "accept or receive a contribution". Under the 1970 version of the Statute, the definitions of the terms "contribution" and "expenditure" were set forth in Section 610's definitional counterpart, Section 591, as follows:

> "The term 'contribution' includes a gift, subscription, loan, advance, or deposit, of money, or anything of value. . ."
>
> "The term 'expenditure' includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value. . ."

In 1972, Section 610 was amended by, *inter alia*, the inclusion of a definition of the phrase "contribution or expenditure":

> "As used in this section, the phrase 'contribution or expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit

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* This claim, raised in Chestnut's pre-trial motion to dismiss the indictment, was rejected by Judge Weinfeld. *United States* v. *Chestnut*, 394 F. Supp. at 583-586.

or gift of money, or any services, or anything of value. . ." *

Chestnut's erroneous contention that the indictment violates the *ex post facto* clause of the Constitution apparently springs directly from his mistaken belief that, until the 1972 amendment of Section 610 when the definitions of "contribution" and "expenditure" in the 1970 version of Section 591 ** were supplemented by the definition of the phrase "contribution or expenditure", causing the receipt of a payment for services rendered on behalf of a political campaign did not constitute the crime of causing the receipt of an illegal campaign contribution.

Chestnut's assertion that the conduct charged in the indictment could only be illegal under the present amended version of Section 610 is conclusively refuted by the Supreme Court's decision in *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972). In *Pipefitters*, which Chestnut has chosen to avoid rather than attempt to explain, the Supreme Court painstakingly traced the legislative history of Section 610 placing particular emphasis on assessing the regulatory impact, if any, of the 1972 amendments. Finding that at the time the amendments were enacted there was substantial agreement in Congress that the effect of the amendment to Section 610 was a "mere codification and clarification" "to spell out in more detail what a . . . corporation can or cannot do in connection with a federal election", 407 U.S. at 410-411, the Court held that the Federal Election Campaign Act's Amendment of Section 610 "merely codifies prior law", 407 U.S. at 399. What that prior law was, both in 1970 and earlier, and its plain applicability to Chestnut's

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* As amended Feb. 7, 1972, Pub. L. 92-225, Title II, § 205, 86 Stat. 10.

** Also amended in 1972, 86 Stat. 8.

machinations with the two AMPI checks is set out in Point III, *supra.*

Chestnut also claims that the grand jury improperly returned the indictment under the amended 1972 version of section 610, stressing that the citation of Section 610 at the end of the charging allegations set forth in the indictment contains "no allusion to the official statutes at large or indication that any version [of Section 610] other than the one in force at the time of indictment * was contemplated; there is no reference to § 591." (Br. at 45) The argument is frivolous, as Judge Weinfeld found. *United States* v. *Chestnut, supra*, 394 F. Supp. at 584-585.

Even assuming *arguendo* that it was error not to cite the specific 1970 version of Section 610, pursuant to Rule 7(c) of the Federal Rules of Criminal Procedure, such error in citation would be a ground for dismissal of the indictment only if Chestnut could establish that he had been misled to his prejudice. *United States* v. *Rivera, supra*, 513 F.2d at 533 n.21. No such demonstration has here been made. On the contrary, by pre-trial motion, Chestnut professed confusion about the version of Section 610 under which the indictment had been brought. Judge Weinfeld properly determined as a matter of law from the facts pleaded, *United States* v. *Nixon*, 235 U.S. 231, 235 (1914); *United States* v. *Meyer*, 266 F.2d 747, 753 (5th Cir.), *cert. denied*, 361 U.S. 875 (1959); *United States* v. *McKenney*, 181 F. Supp. 143, 146 (S.D.N.Y. 1959), *aff'd sub nom. United States* v. *Galano*, 281 F.2d 908 (2d Cir. 1960), *cert. denied, sub nom. Carminati* v. *United States*, 366 U.S. 960 (1961) and *Galgano* v. *United States*, 366 U.S. 967 (1961), that the indictment had been obtained

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* This indictment was filed in the Southern District of New York on December 24, 1974.

under the 1970 version of the statute. Since Judge Weinfeld's resolution of this issue ended Chestnut's confusion about the matter prior to trial, Chestnut cannot now reasonably claim to have suffered any prejudice whatever. *United States* v. *Chestnut, supra,* 394 F. Supp. at 584; *United States* v. *Calabro,* 467 F.2d 973, 981 (2d Cir. 1972), *cert. denied,* 410 U.S. 926 (1973); *United States* v. *Galgano,* 281 F.2d 908, 910-911 (2d Cir. 1960), *cert. denied, sub. nom. Carminati* v. *United States,* 366 U.S. 960 (1961) and *Galgano* v. *United States,* 366 U.S. 967 (1961). *Compare United States* v. *Zeehandelaar,* 498 F.2d 352, 356 (2d Cir. 1974).

Notwithstanding Chestnut's mistaken view, the validity of this indictment ultimately hinges on its pleaded allegations, not on the form of the statutory citation appearing therein. *United States* v. *Bethany,* 489 F.2d 91, 93 (5th Cir. 1974). Accordingly, in assessing Chestnut's claim that the indictment was improperly obtained under the 1972 version of the statute, Judge Weinfeld carefully analyzed the essential charge projected within the indictment as follows, 394 F. Supp. at 585:

> "[t]he allegations which spell out the payment by AMPI to L & N for the services it rendered to the Humphrey campaign merely describe the details whereby it is charged the defendant engaged in artifice or subterfuge to conceal the receipt of the contribution. Instead of accepting and receiving the contribution directly from AMPI, the defendant allegedly conceived the method described whereby he received a contribution to the Humphrey campaign by arranging for AMPI to satisfy a debt by the Humphrey campaign to its advertising agency."

Thus, on the basis of the facts pleaded in the indictment and his analysis thereof, Judge Weinfeld was fully justified in concluding as he did, 394 F. Supp. at 584-585, that the indictment charged Chestnut with criminal conduct under the 1970 version of the statute.

Chestnut advances a final flimsy claim. Apparently, the Watergate Special Prosecution Force provided Chestnut with a copy of the indictment to which a copy of the 1972 statute was attached. The reason therefor is unclear. Chestnut views this as proof that the grand jury improperly returned the indictment under the 1972 version of the statute. Whatever the reason, it is of no consequence whatever in determining whether the indictment violates the *ex post facto* clause of the constitution. Judge Weinfeld, aware that the validity of the indictment had to be determined solely by its pleaded allegations, decided, as a matter of law, *United States* v. *Chestnut*, *supra*, 394 F. Supp. at 584-585, that the indictment was perfectly valid because the charges projected therein were plainly "embraced within the version of the statute in force at the time of the commission of the alleged offense." See *United States* v. *Hutcheson*, 312 U.S. 219, 229 (1941); *Williams* v. *United States*, 168 U.S. 382, 389 (1897); *Paz Morales* v. *United States*, 278 F.2d 598 (1st Cir. 1960); *Pettway* v. *United States*, 216 F.2d 106 (6th Cir. 1954); *United States* v. *Kolodny*, 149 F.2d 210 (2d Cir. 1945).

POINT V

Neither Lilly's Testimony Nor The Court's Refusal To Charge On Section 608 In The Form Requested By Chestnut Was Unduly Prejudicial.

Chestnut contends that since Lilly's personal check and cash contributions* to the Humphrey Campaign were lawful under Section 608 of Title 18, United States Code,** it was prejudicial error to allow Lilly to testify that he believed these contributions violated Section 608's prohibition against annual contributions in excess of $5,000.*** Moreover, he contetnds that the trial court's

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* The three contributions consisted of two personal checks in the amounts of $10,000 and $1,450 and $12,500 in cash personally delivered to Chestnut. Both checks, in accordance with Chestnut's instructions, were made payable to the MDCC All of these contributions were in fact made with AMPI corporate funds in violation of Section 610 (Tr. 142-159; App. 260-277).

** Chestnut at one place in his argument of this point (brief at 48) appears to argue that these three contributions did not violate Section 610 either. However, Chestnut concedes earlier in his brief (at 18 n.21) that these contributions did violate Section 610, and, given their source, there can be no doubt that these contributions violated Section 610. As will be seen *infra*, whether these three contributions were illegal or not was in no way determinative of their admissibility.

*** Section 608, in pertinent part, provides:

(a) Whoever, directly or indirectly, makes contributions in an aggregate amount in excess of $5,000 during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office, including the offices of President of the United States and Presidential and Vice Presidential electors, or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the nomination

[Footnote continued on following page]

instructions on similar acts and conduct, combined with its refusal to charge on Section 608 as requested, exacerbated this error by, in effect, telling "the jury the acts were similar, i.e. inferentially illegal (which they were not) and thus probative of willfulness (which they were not)." * Chestnut's contentions are without merit.

It is well at the outset to place Chestnut's contentions in their proper context. Prior to trial the Government notified the defense that it intended to offer evidence of three similar acts on Chestnut's part in accepting illegal AMPI corporate contributions from AMPI's employee, Lilly. The sole purpose in offering this evidence was to show intent and knowledge in a pattern or scheme of systematically planned and practically identical crimes. The Government's offer of proof was that these transactions were particularly probative because of their close proximity in time and close relationship in both subject matter and modus operandi to the crime charged in the indictment. Moreover, the Government alleged that these contributions were additionally illegal because they exceed the maximum yearly contribution permitted under Section 608. Before any testimony on these transactions was taken, Chestnut moved to suppress the evidence on the grounds that they were irrelevant to show knowledge and intent with respect to the AMPI contributions charged in the indictment and that

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or election of any candidate for any such office or the success of any national political party, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

This subsection shall not apply to contributions made to or by a State of local committee or other State or local organization or to similar committees or organizations in the District of Columbia or in any Territory or Possession of the United States.

* These same contentions, although in slightly different form, were presented to the court below in Chestnut's post-verdict motion for a judgment of acquittal. Judge Weinfeld found them to be without merit (App. 801-803).

since all the contributions were made to "state or local committees," and thus they were not illegal under Section 608. Judge Weinfeld held the evidence admissible on the issue of intent and consciousness of wrong doing. (Tr. 132-141; App. 250-259).

Prior to Lilly's testifying about the circumstances surrounding the similar acts, the trial judge charged the jury on the limited purpose for which this evidence was to be received. (Tr. 141-142; App. 259-260). During the course of his testimony relating to the contributions, Lilly admitted that he knew the contributions were illegal because they were made with disguised corporate funds. He also testified that he believed they were illegal under another section of the Corrupt Practices Act (18 U.S.C. § 608), since, on their face, they exceeded the $5,000 maximum annual contribution permitted by that section. No objection was taken to Lilly's testimony (Tr. 149, 153; App. 267, 271). On cross-examination Lilly was repeatedly questioned about the latter assertion and asked to repeat it several times (Tr. 187-191; App. 304-308). At the close of the Government's case, after four other witnesses had testified, Chestnut moved to strike that portion of Lilly's testimony relating to his belief in the illegality of the contributions under "some section or other," as defense counsel put it. This motion was denied on the ground that no objection had been taken when the testimony was given and on the further ground that defense counsel had extensively cross-examined Lilly on this subject (Tr. 314-316; App. 429-431). On the defense case John French, Chestnut's legal adviser during the Humphrey campaign, and Chestnut both testified that they did not believe these contributions to be illegal under Section 608 since they were made to state or local committees. French disclaimed any knowledge, however, of the Minnesota Democratic Campaign Committee, to which Lilly's two personal checks had been made payable upon Chestnut's instructions (Tr. 340-344, 407-408; App.

454-458, 521-522; DX.E). At the conclusion of all the evidence, Chestnut requested an instruction as to the three contributions comprising the similar acts which concluded with the following language:

> "...you are instructed that there was no legal limit of $5,000 upon contribution [sic] made to a state or local committee or other state or local organization, and any contribution by Mr. Lilly to such a state or local organization was not illegal." (App. 727).

The request was denied.

After the Court's charge to the jury, Chestnut excepted "...to the Court's failure to instruct the jury that no violations of Section 608 was [sic] shown and that as a matter of law, the payments from Lilly other than the two AMPI checks in question did not violate Section 608." (Tr. 568; App. 684). No additional instruction was given.

Even assuming, *arguendo*, that Lilly's belief concerning the illegality of the three contributions under Section 608 was entirely erroneous,* it was not, as Chestnut mistakenly contends, the opinion of illegality rather than the evidence of the transactions themselves which was probative and damaging. Nor was the admissibility of the evidence of these transactions in any way contingent on the accuracy of Lilly's expressed belief of their illegality under Section 608. It is settled law in this Circuit that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character or disposition. See e.g., *United States* v. *Campanile*, 516 F.2d 288, 291-293 (2d Cir. 1975); *United States* v. *Gerry*, 515 F.2d 287, 294-95 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3584 (April

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* See note page 48, *infra*.

28, 1975). Similar act evidence is admitted to show wilfulness, knowledge, intent, plan or design, modus operandi and for other purposes, not because it may indicate the commission of a crime but in spite of that. *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir., August 28, 1975) slip op. at 5865; *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir. 1973); *United States* v. *Friedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States* v. *Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States* v. *Byrd*, 352 F.2d 570, 572 (2d Cir. 1965). Here the evidence of the three contributions was offered to prove Chestnut's knowledge and intent at the time of the transaction charged. The similar act evidence was particularly probative because the three contributions, like the Lennen & Newell payments by AMPI charged in the indictment, were: (1) made with AMPI corporate funds in violation of Section 610; (2) made in connection with the same campaign; (3) disguised in such a maner as to make it appear that AMPI had made no contributions to Humphrey's campaign; and finally, (4) arranged by Chestnut.

Moreover, given Chestnut's explanation that he believed that these three contributions transmitted by Lilly and the $12,000 provided by Lilly to pay the Humphrey campaign's expenses at Lennen & Newell came from the same source—AMPI's legal political trust fund, TAPE, the evidence of the three additional contributions was proative (1) because, given the absurdity of Chestnut's claim that he believed a legal political trust fund of a nationwide cooperative of 42,000 members would make legal contributions by means of Lilly's personal checks and $12,500 in cash, the jury was entitled to infer that Chestnut could not have truly supposed that *any* of the contributions he received from Lilly, including the two checks for Lennen & Newell, were legitimate campaign contributions from TAPE; and (2) even if Chestnut's assertions that he believed the three additional contributions were legal contributions from TAPE were to be credited, then the circuitous and clandestine method arranged by

Chestnut to funnel the $12,000 directly to Lennen & Newell clearly suggested that this $12,000 was not, in Chestnut's mind, simply another legal contribution from TAPE. *United States* v. *Diorio*, 451 F.2d 21 (2d Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); see also *United States* v. *Leonard*, *supra*, slip op. at 5865-5866. In these circumstances, it is indisputable that the Lilly contributions were indeed similar, were in fact probative of intent and knowledge, and were not received, as Chestnut erroneously contends (Brief at 48) solely to show that he "was a bad man, predisposed to accept the unlawful *corporate* checks on trial." *United States* v. *Kaufman*, 453 F.2d 306, 310-311 (2d Cir. 1971); *United States* v. *Leonard*, *supra*.

Given the fact that the similar act evidence was admissible for the limited purpose for which it was offered, and in spite of the fact that it also showed the commission of a series of crimes,* the sole remaining inquiry is whether Lilly's opinion of illegality, albeit in part incorrect,** entitles Chestnut to any relief in this Court. We submit that it does not.

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* Multiple violations of Section 610.

** Under the "state or local committee" exception of Section 608, which totally emasculates the statute's prohibitions against excessive contributions, the two Lilly checks of $10,000 and $1,450 payable to the Minnesota Democratic Camapign Committee would apparently not be illegal. The $12,500 cash contribution, however, which Lilly testified he delivered to Chestnut and Chestnut acknowledged receiving, was clearly illegal under this section since it was not made to a state or local committee, but rather given directly to Chestnut as campaign manager (Tr. 154-155, 408-410; App. 272-273, 552-524). At the time of the argument with regard to the admisibility of the evidence of the three additional AMPI contributions, Chestnut conceded that there was no evidence that the $12,500 cash payment Chestnut received from Lilly had been made to a "state or local committee" (Tr. 135; App. 253), a concession later borne out by the proof, and since Chest-

[Footnote continued on following page]

First, Chestnut is foreclosed from raising this issue on appeal since he permitted the testimony to be received without objection, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Rivera, supra*, 513 F.2d at 526 n. 11, and then endeavored to discredit Lilly on the same subject matter during cross-examination. Having used the evidence to which no objection was made for his own purposes, Chestnut may not now claim that its receipt in evidence was error. *Lawn* v. *United States*, 355 U.S. 339, 350-355 (1957).* Moreover, having failed

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nut was relying on the exception to the general prohibition of Section 608 for "state or local committee[s]", the burden was on him ". . . to set it up and establish it." *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922). See also *United States* v. *Messina*, 481 F.2d 878, 880 (2d Cir.), *cert. denied*, 414 U.S. 974 (1973).

* Chestnut cannot properly claim that Judge Weinfeld's admission of the evidence of the three additional AMPI contributions over Chestnut's objection relieved him of the obligation to object to Lilly's testimony that he believed that these three contributions violated Section 608. First of all, while the Government's memorandum in support of the admission of this evidence (App. 108-114) did suggest (App. 111) that these contributions violated Section 608, the Government's argument in the memorandum (App. 112-114) and orally (Tr. 136-137; App. 254-255) that these contributions should be admitted as similar acts was in no way contingent on their being illegal under Section 608, nor was the Government seeking a ruling at that time that Lilly should be permitted to testify that he believed that the three contributions violated Section 608. Similarly, Judge Weinfeld's remarks in overruling Chestnut's objection to the admission of this evidence in no way suggested that the assertion in the Government's memorandum that these contributions violated Section 608 played any part in his conclusion that they were admissible to show intent and consciousness of wrongdoing. Nor did Judge Weinfeld in any way intimate whether he agreed with the Government's view that Section 608 had been violated or whether he would permit the Government to attempt to prove to the jury, on the testimony of Lilly or otherwise, that Section 608 had been violated.

in the first instance to object to Lilly's testimony that the contributions violated Section 608, Chestnut's motion to strike Lilly's testimony, coming as it did after he extensively cross-examined Lilly and after the Government had called four additional witnesses and rested its case, was unseasonable and properly denied. I Wigmore, Evidence § 18, at p. 325 (3d ed. 1940).

Second, assuming that a charge on Section 608 would lie even absent a timely objection and motion to strike Lilly's testimony, the charge requested by Chestnut was objectionable because, although a portion was clearly limited to 608, the concluding language requested that, without any qualification, the jury be told that Lilly's three additional contributions "were not illegal" (App. 727). As these contributions, all made with corporate funds, indisputably violated Section 610, the request was properly denied. *United States* v. *Leonard*, *supra*, slip op. at 5850-5852; *United States* v. *Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). Similarly, Chestnut's oral request for an instruction that these contributions did not violate Section 608, made after the trial judge had concluded his charge, was properly denied.* *United States* v. *Gonzalez-Carta*, 419 F.2d 548, 552 (2d Cir. 1969); *United States* v. *Kahaner*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963); *cf. United States* v. *Frank*, 494 F.2d 145, 159-161 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). Moreover, since the testimony concerning Section 608 related exclusively to the similar act evidence which Judge Weinfeld twice charged the jury could not be considered as any proof that Chestnut committed the crimes charged, the limiting instructions given were more than adequate to protect Chestnut's presumption of innocence. *United States*

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* Quite apart from untimeliness, Chestnut's request was still overbroad since there was no evidence that the final contribution of $12,500 in cash received by Chestnut was paid to a state or local committee. See, *supra*, page 48, n.2.

v. *Hoffman*, 415 F.2d 14, 20 (7th Cir.), *cert. denied*, 396 U.S. 958 (1969); *accord*, *United States* v. *Gaus*, 471 F.2d 495, 501 (7th Cir.), *cert. denied*, 412 U.S. 938 (1973).

Finally, whether the similar acts were legal or illegal was irrelevant, *United States* v. *Leonard*, *supra*. Their probative value on the issue of Chestnut's knowledge and intent at the time of the transaction charged was the same regardless of how they were characterized. Judge Weinfeld's instructions to the jury both before Lilly testified and in the charge made this crystal clear. The court explicitly instructed the jury that this evidence was received exclusively for a limited purpose; that it was no proof that the defendant committed the crime charged; and that, it could be considered by the jury only for the narrow purpose for which it was received (Tr. 141-142, 556-557; App. 259-260, 672-673). Moreover, it is unlikely that the jury credited Lilly's legal opinion. Lilly's knowledge of the campaign laws and his legal opinion were severely discredited by defense counsel's probing inquiry on cross-examination, by his reading the statute aloud to the jury, and by the testimony of both John French, the legal expert called by the defense, and Chestnut (Tr. 178-191, 340-343, 407-408; App. 304-308, 454-457, 521-522).* Under all these circumstances, the prejudice to Chestnut from Lilly's opinion was at worst *de minimis*. See *United States* v. *Gottlieb*, 493 F.2d 987, 992 (2d Cir. 1974); *United States* v. *Leonard*, *supra*, slip op. at 5866-5868.

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* Indeed, given the opening of a withering assault on Lilly's credibility that this brief testimony about Section 608 made available, it is apparent that Chestnut's failure to object to the testimony was deliberate trial strategy.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

EUGENE F. BANNIGAN, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of September, 1975 he served ~~a copy~~ two copies of the within BRIEF(US CT.OF APPEALS)75-1268 CORRECTED COPIES by placing the same in a properly postpaid franked envelope addressed:

JACK S. NORDBY, ESQ.
THOMSON, WYLDE & NORDBY
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And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

EUGENE F. BANNIGAN
ASSISTANT U.S. ATTORNEY

Sworn to before me this

30th day of September, 1975.

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4500237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 197